SIMEON M. HERSKOVITS
New Mexico State Bar No.16860
ADVOCATES FOR COMMUNITY AND ENVIRONMENT
129-C Kit Carson Road
Taos, NM 87571
Phone: (505) 758-7202
Fax: (505) 758-7203
e-mail: simeon@communityandenvironment.net

CHERI K. EMM-SMITH
Nevada State Bar No. 3055
MINERAL COUNTY DISTRICT ATTORNEY
P.O. Box 1210
Hawthorne, NV 89415
Phone: (775) 945-3636
Fax: (775) 945-0700

Attorneys for MINERAL COUNTY, NEVADA

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	Case No. 3:73-cv-127 In Equity No. C-125-ECR Subfile No. C-125-B RESPONSE TO MOTION TO MODIFY CASE MANAGEMENT ORDER

INTRODUCTION

Proposed Intervenor Mineral County, Nevada, (Mineral County) respectfully submits this Response in Opposition to the Motion to Modify Case Management Order filed by defendants David Haight and Tom Reviglio (Motion). The Motion should be denied for a number of reasons. First, Defendants have failed to make the required showing of good cause why the Case

Management Order (CMO) should be amended. Second, several of the modifications to the CMO that Defendants propose would result in redundancy, delay, confusion, and unnecessary additional burdens being imposed on the Court and the parties to this case. Third, contrary to Defendants' assertion, in addition to this litigation the issues at stake here also are being addressed through an alternative process of meetings and negotiations aimed at producing a comprehensive Indian water rights settlement that would resolve most if not all of the issues presented in this case. And fourth, those measures which Defendants have proposed that might improve the efficiency and expeditiousness of this case's disposal may be implemented under the CMO without its modification. For all these reasons Defendants' Motion should be denied.

Notwithstanding the fact that Defendants' Motion is without merit and should be denied, Mineral County agrees that there are measures that, under the CMO, the Court could take which would expedite the progress of this case. Mineral County believes the Court should take these up with the parties at the next scheduled status conference and establish procedures and schedules for such measures.

I. Defendants Have Failed to Make the Required Showing of Good Cause:

In their Motion, Defendants repeatedly advise the Court as to how, in their opinion, this case could be better managed than it has been under the CMO entered by the Court on April 19, 2000. The CMO was entered only after the Court heard from all the principal parties to this action and only after dues deliberation over how best to preserve the rights of existing and future parties, how to order the disposition of issues procedural and substantive most logically and efficiently, and how to provide the amplest opportunity for settlement discussions to proceed. While Defendants offer opinions as to how circumstances have changed and how the CMO ought to be changed to permit discovery and dispositive motion practice to proceed more or less immediately, before service has been completed, Defendants articulate no cause whatsoever, let alone good cause, for any necessary modification of the CMO.

Defendants' failure to make any showing of good cause as to why the CMO must be modified is fatal to their motion. Under the Federal Rules of Civil Procedure a case

management, or scheduling, order "shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." Fed.R.Civ.P. 16(b);. In the absence of a showing of good cause courts routinely deny motions to amend case management orders. See, e.g., Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087-88 (9th Cir. 2002); Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608 (9th Cir.1992); Koplove v. Ford Motor Co., 795 F.2d 15, 18 (3rd Cir. 1986); Abel v. International Business Machines Corp., 2006 WL 618582, at *4 (N.D. Cal. March 9, 2006); Carnrite v. Granada Hosp. Group, Inc., 175 F.R.D. 439, 448 (W.D.N.Y. 1997). Here, Defendants have not even attempted to show cause why the CMO must be modified. Rather, they simply "suggest" to the Court their opinions about how the case might be better managed. (E.g., Defendants' Motion to Modify Case Management Order at 4, ln. 24; 5, ln. 9; 7, ln. 20; 8, ln. 1; 9, ln. 12; 10, ln. 7.)

As explained below, the CMO possesses sufficient flexibility to provide for procedural changes that would expedite the progress of this case and enhance the efficiency of its administration. Given the CMO's apparent adequacy and the absence of any showing of good cause on the part of Defendants as to why the CMO must be modified, Defendants' Motion should be denied.

II. Defendants' Proposals Would Burden the Court and Prejudice Other Parties:

Among the modifications to the CMO that Defendants request are the filing and resolution of dispositive motions, the disclosure of the parties' legal theories, and full document disclosure before the completion of service. The Court has previously considered and rejected requests to allow both discovery and dispositive motion practice to proceed prior to the completion of service. The Court's reasons for doing so were straightforward and they remain valid. See Case Management Order ¶ 3 (requiring completion of service on water rights holders whose interests could be affected by this litigation before the Court will consider procedural and substantive issues that could affect those parties' interests); Id. at ¶ 15 (deferring discovery until after the disposition of threshold issues); Minutes of May 11, 1999, at 2 (doubting whether parties would be bound by substantive findings made before such parties were joined).

The consistent animating concerns in the CMO and the Court's previous refusals to allow discovery or dispositive motions to proceed prior to the completion of service have been: (1) to safeguard the opportunity of all parties' to defend their interests meaningfully in this litigation; and (2) to avoid the risk of unnecessarily duplicative, costly litigation activity. Nothing has happened to alter these fundamental bases for case management in this instance. To amend the CMO so as to permit discovery and dispositive motions before service is completed likely would involve the Court and the parties in redundant rounds of discovery, briefing, and argument. This would impose additional costs on the Court and would represent an inefficient use of the Court's time and resources.

Permitting discovery and dispositive motions at this time also would prejudice some parties by exposing them to the increased costs of repetitively briefing and arguing the same issues, and by undermining their ability to complete service without premature disruption. The potential for the proposed amendment of a case management order to prejudice parties opposing the motion has been held to constitute additional grounds for denial of a motion to amend a case management order. See Johnson, 975 F.2d at 609; Andretti v. Borla Perfomance Indus., Inc., 426 F.3d 824, 830 (6th Cir. 2005); Westlands Water Dist. v. Patterson, 900 F.Supp. 1304, 1314 (E.D. Cal. 1995) (motion to amend CMO denied in part because it would prejudice intervenors), rev'd on other grounds, 100 F.3d 94 (9th Cir. 1996). Accordingly, the Court also should deny Defendants' Motion because the modifications sought therein would prejudice parties opposing the Motion.

III. There Is An Ongoing Alternative Indian Water Rights Settlement Process:

Defendants assert that: "Since the end of the mediation process, the current track is the only track on which the case is now moving and it makes sense to accelerate that movement so the parties can be spared further delay in obtaining a resolution of the critical issues this case is designed to address." Defendants' Motion to Modify Case Management Order at 7, lns. 22-25. This assertion is simply wrong.

Since February of this year a series of stakeholder meetings and negotiations involving the parties to this case has been proceeding under the leadership of Senator Harry Reid. These negotiations are expressly intended to produce a comprehensive Indian water rights settlement resolving most, if not all, of the core issues in this case. This alternative settlement process was commenced in the wake of the court-ordered mediation's collapse late last year. While the Indian water rights settlement process is still in its preliminary phase, and its prospects for success cannot be predicted with confidence, it is not true that the litigation before this Court is the only ongoing process designed to resolve the issues involved in this case. Thus, while the litigation should progress as expeditiously as is consistent with the CMO, the Court should be wary of modifying the CMO in such a way as to subvert those parallel negotiations.

IV. The Litigation Can Be Expedited Under The CMO In Its Current Form:

As explained above, Defendants' Motion lacks merit and should be denied. Nonetheless, Mineral County believes that some of the measures advocated in Defendants' Motion might help this case progress toward resolution more efficiently and expeditiously, and that such measures can be crafted and implemented by the Court and the parties under the CMO in its current form. For example, procedures and schedules for the completion of service and the identification of threshold issues already are contemplated in the CMO. Case Management Order at ¶¶ 6, 10, 11. These issues could be addressed at the next scheduled status conference, at which the Court could establish a schedule for the parties to submit proposals on these issues and for futher deliberation on those proposals' relative merits.

By addressing the procedure and schedule for completion of service and identification of threshold issues in this way, the Court could meaningfully expedite the instant case without subverting the fair, efficient resolution of the issues in the case with regard to all parties. Beyond those aspects of case management, however, the Court should be cautious about altering its approach to the administration of this case.

CONCLUSION

For the reasons set forth above, Mineral County respectfully requests that the Court deny Defendants' Motion to Modify the Case Management Order.

Dated: May 14, 2007

Respectfully submitted,

ADVOCATES FOR COMMUNITY
AND ENVIRONMENT
129-C Kit Carson Road
Taos, New Mexico 87571
(505) 758-7202
simeon@communityandnevironment.net

By: //s// Simeon Herskovits
SIMEON M. HERSKOVITS
Attorneys for Mineral County, Nevada

CHERI K. EMM-SMITH
MINERAL COUNTY DISTRICT ATTORNEY
P.O. Box 1210
Hawthorne, Nevada 89415
(775) 945-3636
districtattorney@mineralcountynv.org

By: //s// Cheri Emm-Smith
CHERI K. EMM-SMITH
Attorney for Mineral County, Nevada